

Arbitration - Portugal

Overview (June 2011)

Contributed by

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The past 10 years have seen significant growth in the use of arbitration in Portugal. This has resulted in a change in thinking among practitioners and academics and - with a new arbitration law under discussion - on a political level. The key role that arbitration has assumed can be seen in several aspects of Portuguese legal practice.

A decade of growth

The number of domestic and international arbitrations has increased rapidly, demonstrating the great demand for arbitration in Portugal.

The main forum remains the Arbitration Centre of the Portuguese Chamber of Commerce and Industry, which is the Portuguese representation of the International Chamber of Commerce. However, more than 30 arbitral institutions are now authorised to resolve disputes in many different areas, from commercial and consumer issues to disputes over car insurance and IP rights.

Ad hoc arbitration is also increasing, as shown by a recent initiative of the Portuguese Arbitration Association, which is conducting an extensive and ongoing survey of arbitral awards.

The past decade has seen not only a rise in arbitration between international parties, but also the emergence of Portuguese practitioners acting as arbitrators or counsel in international arbitrations in other jurisdictions. Such experts are called upon particularly when the seat of the arbitration is in a country where Portuguese is an official language, such as Brazil, Angola, Cape Verde and Mozambique.

As a result of these developments, arbitration has received greater attention from practitioners and academic commentators and in case law. Law firms are making arbitration a priority and investing in specialisation and training, while law schools are also giving the discipline a more prominent role.⁽¹⁾ Arbitration is more widely studied and written about than ever before, and an increasing number of conferences and seminars are being held to discuss a wide range of arbitration-related topics - October 2011 will see the inaugural *Encontros Internacionais de Arbitragem de Coimbra*, which is intended to be an annual arbitration event. The Portuguese Arbitration Association has had a significant impact in this area, promoting conferences, publishing an annual arbitration review (the *Revista Internacional de Arbitragem e Conciliação*) and participating in the preparation of a new arbitration law.

These are clear indications that Portugal has truly embraced arbitration as a dispute resolution method.

Case law

The case law of the past 10 years provides ample evidence of the courts' growing tendency to favour arbitration. During that time, a number of decisions have proved to be particularly significant.

Interim measures

Existing arbitration legislation does not provide for interim measures ordered by an arbitral tribunal - the law is silent on the matter.

On May 17 2005 the Oporto Court of Appeal held that arbitral tribunals may order interim measures, provided that the parties have agreed on the matter and the measures do

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not involve the use of public force by the tribunal.(2)

Automatic enforcement

The Supreme Court decision of March 19 2009 was a landmark in arbitration case law - albeit a controversial one. The court held that an arbitral award from a state that is a signatory to the New York Convention can be automatically enforced in Portugal without being reviewed or confirmed (for further details please see

"[Enforcement of awards under New York Convention](#)"). Although the court's interpretation of the convention has been questioned, its decision clearly demonstrated a trend in favour of arbitration.(3)

Non-disposable rights

In Portugal, disputes concerning non-disposable rights cannot be arbitrated - an arbitration agreement to that effect is invalid. However, on January 11 2011 the Lisbon Court of Appeal held that in such cases, the invalidity of an arbitration agreement relates only to rights which are absolutely non-disposable, not to those which are relatively non-disposable.(4) Thus, rights that involve an economic interest are arbitrable (for further details please see

"[Court rules on objective arbitrability and non-disposable rights](#)").

A contrary view?

The clear conclusion from the past 10 years is that the courts are becoming more arbitration-friendly. The only significant exception is the Constitutional Court decision of May 30 2008, which favoured the constitutional right of access to justice over an arbitration agreement signed by the parties.(5) The court considered Article 494(j) of the Civil Procedure Code, which allows the dilatory exception of breach of the arbitration agreement. It held the provision to be unconstitutional when interpreted to the effect that an objection to a breach of the arbitration clause may be enforceable against a party that is in a situation of supervening financial hardship which entitles it to legal aid (where the dispute relates to facts to which the party's situation may be attributable).

Although unfavourable to arbitration, this decision does not bind other courts (for further details please see "[Right to plead case versus enforcement of arbitration agreement](#)").

New arbitration law

Portugal's arbitration law dates from 1986.(6) It has been clear for some time that the country needs a more sophisticated law that is in step with modern trends.

At the instigation of the government, the Portuguese Arbitration Association has prepared a draft of a new arbitration law. Although the draft is still being debated and discussed, it will clearly draw heavily on the United Nations Commission on International Trade Law (UNCITRAL) Model Law.

The key differences between the new UNCITRAL-inspired draft and the existing legislation are likely to relate to:

- the criteria for arbitrability - disputes relating to economic interests will be explicitly identified as arbitrable;
- the power of arbitral tribunals to order interim measures; and
- multi-party arbitrations, on which new specific provisions are expected.

The new law recently came very close to approval, but the political situation and the recent elections have delayed its entry into statute. However, it appears to be only a matter of time before new legislation is finally approved.

For further information on this topic please contact [José Miguel Júdice](#) or [António Pinto Monteiro](#) at PLMJ - AM Pereira, Saragga Leal, Oliveira Martins, Judice e Associados - Sociedade De Advogados, RL by telephone (+351 21 319 7300), fax (+351 21 319 7400) or email (jmj@plmj.pt or anpm@plmj.pt).

Endnotes

(1) Particularly the annual postgraduate course in arbitration at the *Universidade Nova de Lisboa*, promoted by Professors Mariana França Gouveia and Tiago Duarte.

(2) Case 0522209.

(3) See Júdice and Monteiro, "*Do reconhecimento e execução de decisões arbitrais estrangeiras ao abrigo da Convenção de Nova Iorque – Anotação ao Acórdão do Supremo Tribunal de Justiça de 19/03/2009*", in *Revista Internacional de Arbitragem e Conciliação*, III, Almedina, Coimbra, 2010.

(4) Case 3539/08.6TVLSB.L1-7.

(5) See Júdice, "*Anotação ao Acórdão 311/08 do Tribunal Constitucional*", in *Revista Internacional de Arbitragem e Conciliação*, II, Almedina, Coimbra, 2009, pages 161 to

(6) Law 31/86, as amended by Legislative Decree 38/2003.

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